

Professional Conduct Board Review of Formal Charge Cases

The following information outlines the Hearing Committee's role in formal charge disciplinary cases.

If Bar Counsel's review of a disciplinary grievance does not result in an NAT disposition, dismissal or private sanction, the grievance may result in a formal charge. The general function of the Hearing Committee in formal charge cases is to oversee the entire process, including scheduling hearing dates, discovery cutoffs, motion cutoffs and to adjudicate where necessary, discovery disputes, pre-hearing motions, evidentiary matters and conduct the hearing. The Hearing Committee, generally speaking, provides the record and a recommendation of disciplinary sanctions that should be imposed to the Idaho Supreme Court. The exception to that recommendational authority is that only the Professional Conduct Board may issue a public reprimand. I.B.C.R. 506(e). Thus, for any sanction other than a public reprimand, the Hearing Committee makes a recommendation based upon the record before it, whether developed by hearing or stipulation, to the Idaho Supreme Court and the Idaho Supreme Court has the ultimate authority and responsibility to impose all other public disciplinary sanctions.

The following procedure is generally followed in formal charge disciplinary proceedings:

1. Filing of Formal Charges.

Formal charge disciplinary cases may only be filed following a finding of probable cause by the Idaho State Bar Board of Commissioners. I.B.C.R. 511(a). Following that finding by the Board of Commissioners, a Complaint is filed with the Professional Conduct Board. The Complaint generally sets forth the factual basis of allegations that the Respondent has violated specific provisions of the Idaho Rules of Professional Conduct. The Complaint and Summons are filed with the Clerk of the Professional Conduct Board, I.B.C.R. 511(b), and served upon the Respondent, I.B.C.R. 523(c). The Respondent has 21 days following service to file an Answer. I.B.C.R. 511(d). If the Respondent fails to answer the Complaint within the prescribed time, or as extended, the factual allegations of the Complaint shall be deemed admitted, unless Respondent demonstrates his or her failure to answer resulted from mistake, inadvertence, surprise or excusable neglect. In those circumstances, Bar Counsel will generally file a motion to deem admissions or for default for the Hearing Committee's consideration and determination. I.B.C.R. 511(e). ([I.B.C.R. 511](#))

2. Assignment to Hearing Committee.

After a Complaint is filed, the Chair of the Professional Conduct Board shall appoint, from its approved membership, a Hearing Committee to conduct the case. I.B.C.R. 503(a). When a matter is assigned to a Hearing Committee, the Clerk will send the notice of assignment, a copy of the Complaint and any subsequent pleadings to the Hearing Committee members. I.B.C.R. 511(c). Under I.B.C.R. 503(a), no lawyer member of the Hearing Committee shall reside or have his or her principal place of business within the same judicial district in which the Respondent has his or her principal place of business. In addition, no Hearing Committee member shall be assigned to a professional conduct matter or petition for reinstatement if that

member has been assigned previously to a professional conduct matter involving the Respondent. I.B.C.R. 503(a).

The powers and duties of the Hearing Committee are set forth in I.B.C.R. 503(b). Those powers and duties include:

- Conduct disciplinary proceedings;
- Rule upon motions and other matters or delegate such rulings to the Hearing Committee Chair;
- Request further investigation of any matter assigned to it;
- Makes findings of fact, conclusions of law and recommendations;
- Recommend, impose and/or administer Sanctions;
- Recommend interim suspension as provided in I.B.C.R. 510(c); and
- Other related tasks assigned by the Professional Conduct Board or Supreme Court.

If the Respondent is a resident of Idaho, he or she has the right to have the hearing held in the county of his or her residence, provided he or she has requested the same in his or her Answer. If the Respondent is not a resident of Idaho, or has not requested to have the hearing held in the county of his or her residence in the Answer, the hearing shall be at the place designated by the Chair of the Hearing Committee. I.B.C.R. 511(g). Generally speaking, hearings are conducted at the Idaho State Bar Office. [\(I.B.C.R. 503\)](#)

3. Designation of Hearing Committee Chair and Initial Scheduling Conference.

The Notice appointing the Hearing Committee will indicate which Professional Conduct Board member is to be the Committee Chair. Within 21 days after the Hearing Committee has received the Answer, the Chair of the Hearing Committee shall hold a scheduling conference with the parties for the purpose of establishing timetables for the completion of the case. I.B.C.R. 511(f). Although the Rule specifies that this is the Chair's obligation, almost always, the Clerk will schedule a telephone scheduling conference involving all members of the Hearing Committee and parties, so that scheduling can be coordinated at the scheduling conference. Thereafter, the Chair, often in conjunction with the Clerk, shall issue a Scheduling Order, declaring discovery deadlines, trial dates and any other significant dates for the conduct of the matter. I.B.C.R. 511(f). The Hearing Committee Chair should seek to conduct the matter so that the hearing is held within 120 days from the scheduling conference. That hearing date is not mandatory, but aspirational.

Hearing Committee members should notify the Chair, Clerk or Bar Counsel as soon as possible if any member has a reason which requires their disqualification from the Hearing Committee or if any member's schedule is such that it would be unlikely that they could sit on a trial panel in the next several months. The member's schedule may not be an issue until following the scheduling conference. Most requests for disqualification are made immediately and administratively by an assignment of a new Hearing Committee member by the Chair of the Professional Conduct Board. I.B.C.R. 502(c)(3).

Other issues that should be discussed at the initial scheduling conference is to confirm where the hearing will be held as discussed above, I.B.C.R. 511(g), to determine whether a pre-hearing conference would be useful shortly before trial, and reserving a date for that purpose. Most pre-hearing conferences are conducted by telephone and are usually conducted by the Chair. At the scheduling conference, the Chair can determine whether any of the parties anticipate any unusual aspect of the case, which should be addressed early by the Hearing Committee, including the possibility of dispositive motions.

4. Motions - Preliminary Matters.

If there are any procedural motions prior to the assignment of a case to a Hearing Committee, the Chair or the Vice-Chair may determine those motions. I.B.C.R. 502(c)(1).

Under I.B.C.R. 503(b)(2), Hearing Committees have the power to rule upon motions or to delegate such rulings to the Hearing Committee Chair. The Hearing Committee Chair will ordinarily rule on motions or other pre-hearing matters, although the Chair may wish to consult with other members of the Hearing Committee before deciding any particular issue. Most of the motion practice is conducted by telephone conference calls which are organized by the Clerk.

I.B.C.R. 525(b) provides that Hearing Committee Chairs shall have the discretion to allow dispositive motions that would expedite resolution of any disciplinary matter. That rule also provides that except as specifically adopted or referred to in the Idaho Bar Commission Rules, the provisions of the Idaho Rules of Civil Procedure shall not apply in disciplinary cases.

5. Discovery.

Discovery in a disciplinary case is governed by I.B.C.R. 525(k) and is permitted and governed as provided by the Idaho Rules of Civil Procedure. Disputes concerning the scope and other aspects of discovery shall be determined by the Chair of the Hearing Committee and all discovery orders by the Hearing Committee are interlocutory and may not be appealed before the final entry of the order. I.B.C.R. 525(k).

In a formal charge case, Bar Counsel or Respondent may, in accordance with I.R.C.P. 45, issue subpoenas in the name of the Professional Conduct Board. I.B.C.R. 524(b). Any attack on the validity of the subpoena shall be heard and determined by the Chair of the Hearing Committee. I.B.C.R. 524(d).

6. Pre-Hearing Conference.

As set forth above, in cases where it would be useful, pre-hearing conference may be held. I.B.C.R. 525(l). The pre-hearing conference should generally cover the issues addressed in I.R.C.P. 16(c). If appropriate, a pre-hearing order may be issued.

7. Hearing.

Under I.B.C.R. 525(a), disciplinary hearings are neither civil nor criminal, but are sui generis. Disciplinary hearings are basically a hybrid between the administrative proceeding and court trials. The entire Hearing Committee listens to the evidence and the Chair admits exhibits

that are proffered at hearing and rules upon any evidentiary matters related to either exhibits or witnesses. The Idaho Rules of Evidence apply during the hearing proceedings, except as may be otherwise provided, specifically by the Idaho Bar Commission Rules. I.B.C.R. 525(c). The Chair usually rules on evidentiary objections, but may consult with Hearing Committee members before deciding evidentiary objections. The hearing follows the usual trial court procedure: opening statements, presentation of the plaintiff's evidence, presentation of the respondent's evidence, and closing argument. Bar Counsel has the burden of proof in disciplinary proceedings, Respondent has the burden of proof in proceedings seeking reinstatement, readmission, or transfer from disability inactive status. In any show cause proceedings under the Idaho Bar Commission Rules, the burden of proof shall be on the party required to show cause. I.B.C.R. 525(d). The standard of proof on any issue of fact is "clear and convincing evidence." I.B.C.R. 525(e).

A court reporter shall report all evidentiary proceedings, and any other formal charge proceedings for which the Hearing Committee Chair requests a reporter. I.B.C.R. 525(f). The Professional Conduct Board Clerk is responsible for marking and retaining exhibits.

Members of the Hearing Committee are free to ask questions of witnesses. Ordinarily, the Hearing Committee members' questions will follow direct examination and cross-examination. Thereafter, the parties' counsel may have re-direct or re-cross, or may have questions to follow up on questions asked by members of the Hearing Committee.

Motions to exclude witnesses are permitted and generally honored. Disciplinary hearings are open to the public, unless a protective order has been entered as to certain aspects of the case. I.B.C.R. 521(a), (e).

8. Professional Conduct Board Decisions.

Within 28-days following the conclusion of a hearing, the Hearing Committee shall send to the Clerk, the findings of fact, conclusions of law and recommendations. The recommendation should include a recommendation of a sanction, if appropriate. Given the 28-day mandate of I.B.C.R. 511(h)(1), if the transcript preparation will be delayed, it is appropriate to ask the parties to stipulate to an extension of that 28-day period.

If the Hearing Committee concludes that sanctions are appropriate, it should determine which sanction it will impose or recommend. The available disciplinary sanctions and remedies are set forth in I.B.C.R. 506. [\(I.B.C.R. 506\)](#) They include the following:

a. Public Reprimand.

A public reprimand is a public, written reprimand regarding a lawyer's professional conduct. A public reprimand declares the lawyer's conduct to have been improper but does not limit his or her right to practice law. Only the Professional Conduct Board may issue a public reprimand. All public reprimands shall be published in the official Bar publication and on the

official website of the Idaho State Bar. A public reprimand may also include probation consistent with I.B.C.R. 506(f) as long as the terms of probation do not limit the lawyer's license to practice law. Only the Idaho Supreme Court may impose conditions of probation that limit the lawyer's license to practice to law. I.B.C.R. 506(f).

b. Public Censure.

Public censure is an official, written reprimand regarding a lawyer's professional conduct, which shall be published in the Idaho Reports. A public censure declares the lawyer's conduct to have been improper but does not limit his or her right to practice law. Only the Idaho Supreme Court can issue a public censure. In addition to the Idaho Reports, all public censures shall be published in the official Bar publication, on the official Idaho State Bar website, and in a newspaper of general circulation in the judicial district where the lawyer maintains his or her principal place of business.

c. Suspension.

Suspension is the denial of the right to practice law for a specific period of time not to exceed five years. Only the Idaho Supreme Court may order a suspension. A lawyer who has been suspended and desires to again be admitted shall comply with the reinstatement procedures provided in I.B.C.R. 518. I.B.C.R. 510 governs interim suspension.

A lawyer who has been suspended for 90 days or less shall be reinstated at the end of the period of suspension by filing an affidavit with the Idaho Supreme Court stating he or she has complied fully with the requirements of the suspension order and has paid any required fees and costs. I.B.C.R. 518(a). A lawyer suspended for more than 90 days may be readmitted upon showing that he or she has the moral qualifications, competency and learning in the law for admission to practice law in Idaho, that his or her resumption of the practice of law within Idaho will not be detrimental to the integrity of the Bar, to the administration of justice or against the public interest, and that he or she has complied with all the terms of his or her suspension. A petition for reinstatement from suspension exceeding 90 days is assigned to a Hearing Committee. I.B.C.R. 518(b)(4). The suspended lawyer has the burden of proving by clear and convincing that he or she has met the requirements for reinstatement. The Hearing Committee's decision on reinstatement shall be rendered within 21 days after the matter is fully submitted. I.B.C.R. 518(b)(4)(D).

d. Resignation in Lieu of Disciplinary Proceedings.

A resignation in lieu of disciplinary proceedings is not issued by a Hearing Committee. It is a negotiated sanction between the Respondent and Bar Counsel, and the Idaho Supreme Court must approve any resignation in lieu of disciplinary proceedings. I.B.C.R. 506(b).

e. Disbarment.

Disbarment is the revocation of a lawyer's license of authority to practice law in Idaho. The Idaho Supreme Court may order disbarment. A disbarred lawyer may not apply for admission to the Bar sooner than five years from the effective date of disbarment. A disbarred lawyer who desires to be admitted must restart the entire admission process, including taking the

bar examination. A disbarred lawyer making an application has the burden of overcoming the rebuttable presumption of “unfitness to practice law.” I.B.C.R. 506(a).

Sanctions may consist of one or more of the above identified sanctions. Restitution may be imposed as a condition of any probation or in conjunction with any sanction. I.B.C.R. 506(i). Expenses and costs of professional conduct investigation proceedings may be imposed in conjunction with any other sanctions. I.B.C.R. 506(j).

9. Withheld Sanctions.

The sanctions of suspension, public censure, public reprimand and probation may be withheld in whole or part, contingent upon the Respondent’s observation of conditions imposed. Conditions may include the publication of a withheld sanction. I.B.C.R. 507(a). If Bar Counsel believes a Respondent has violated the conditions of a withheld sanction, Bar Counsel may file a motion for order to show cause why the withheld sanction should not be imposed and a Hearing Committee shall be appointed to ascertain the truth of the allegations set forth in the motion. Bar Counsel has the burden of proof that the Respondent has failed to adhere to the conditions set forth in any disciplinary order and, following the hearing, the Hearing Committee shall make findings whether the previously withheld sanction may be imposed by the Hearing Committee or the Idaho Supreme Court, depending on which entity imposed the original withheld sanction. I.B.C.R. 507(b) and (c). [\(I.B.C.R. 507\)](#)

10. Motions to Alter or Amend.

Following the service of the findings of fact, conclusions of law and recommendations by the Hearing Committee, either party may file a motion to alter or amend the findings and recommendations not later than 14 days following service. The Hearing Committee shall consider the motion and within 14 days of receipt of the motion, alter or amend its findings of fact, conclusions of law and recommendations; deny the motion; or schedule the motion for hearing. If no motion to alter or amend is filed, the findings of fact, conclusion of law and recommendations become final within 14 days after they were issued by the Hearing Committee and the record and recommendation, as appropriate, will be forwarded to the Idaho Supreme Court. I.B.C.R. 511(h).

If the Hearing Committee imposes a public reprimand, the public reprimand will be imposed unless either party appeals that recommendation within 21 days of service of the recommendation. I.B.C.R. 511(i). If the recommendation is one of public censure, suspension or disbarment, the Clerk shall transmit all findings of fact, conclusions of law and recommendation to the Idaho Supreme Court together with the entire record of the proceeding within 21 days. I.B.C.R. 511(j). [\(I.B.C.R. 511\)](#)

11. Miscellaneous Matters.

Preemptory Challenge. There is no right of preemptory challenge to Hearing Committee members.

Conflict of Interest. Hearing Committee members shall not take part in any proceedings in which a judge, similarly situated, would be required to recuse himself or herself. I.B.C.R. 503(e).

Lawyers Convicted of Serious Crimes. I.B.C.R. 512 provides that a lawyer who has been convicted of a serious crime as defined in I.B.C.R. 501, shall be conclusive evidence that the lawyer committed the crime and the sole issue in any hearing regarding the conviction shall be the nature and extent of the sanction to be imposed.

Reciprocal Sanctions. Upon being informed that a sanction has been imposed in another jurisdiction, Bar Counsel may seek an ex parte order from the Chair of the Professional Conduct Board directing the lawyer to show cause, if any, why the identical sanction should not be imposed in Idaho. The Chair of the Professional Conduct Board will assign the matter to a Hearing Committee to conduct the show cause hearing. The hearing will be processed similar to other disciplinary hearings set forth above. After hearing, the Hearing Committee shall recommend the imposition of an identical sanction in Idaho, unless the Hearing Committee finds that Respondent has shown by clear and convincing evidence that it appears clearly, from the face of the record from which the sanction is predicated, that the procedure was so lacking in notice of opportunity to be heard as to constitute a deprivation of due process or imposing an identical sanction in Idaho would result in grave injustice. I.B.C.R. 513. [\(I.B.C.R. 513\)](#)

Stipulations. Following the filing of a formal charge complaint, the Respondent and Bar Counsel may resolve the matter by stipulation. Stipulations set forth a summary of the formal charge allegations, admitted factual allegations, admitted violations of the Idaho Rules of Professional Conduct, charges being dismissed, if any, and the agreed upon sanction. Upon submission of a stipulation, the stipulation is forwarded to the Hearing Committee to consider the stipulation and enters its decision or order a hearing on its own motion. I.B.C.R. 514. [\(I.B.C.R. 514\)](#)

Immunity. I.B.C.R. 520 provides that members of the Professional Conduct Board and members of the Hearing Committees shall be immune from civil suit and damages for any conduct or occurrence in the course or arising out of performance of any official duties in connection with the Idaho Bar Commission Rules. I.B.C.R. 520. [\(I.B.C.R. 520\)](#)

Access to Information. Prior to the filing and service of formal charges, a Professional Conduct matter is confidential. I.B.C.R. 521(b). Thus, records and information relating to a Hearing Committee's review of Bar Counsel dispositions are confidential. Exceptions to confidentiality are set forth in I.B.C.R. 521. After a formal charge complaint or petition for reinstatement is filed, the hearing of the professional conduct matter is public except for deliberations of the Hearing Committee, Professional Conduct Board, or aspects of the hearing to which a protective order is pending or issued. Protective orders are governed by I.B.C.R. 521(e), and are considered by the Hearing Committee to which a matter is assigned or the Chair of the Professional Conduct Board if the matter has yet to be assigned to a Hearing Committee. A protective order may prohibit the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order. [\(I.B.C.R. 521\)](#)

Records Retention. Bar Counsel maintains all records related to any disciplinary process and, consistent with I.B.C.R. 522(c), the Professional Conduct Board members shall destroy all records in their possession related to any disciplinary process or matter upon conclusion of such process or matter, including any appeals or remands. [\(I.B.C.R. 522\)](#)

Stay or Abatement. Pending criminal or civil actions with substantial similarity to the material allegations of the alleged grounds for the imposition of sanctions shall not stay the filing nor abate the processing of a review of a lawyer's professional conduct under the Idaho Bar Commission Rules. Bar Counsel or the Professional Conduct Board may, in their discretion, permit such stay or abatement. It is common that Bar Counsel will grant a stay or abatement when criminal matters are pending if requested by the Respondent. Respondents almost always seek a stay or abatement based upon Fifth Amendment privilege grounds. I.B.C.R. 525(g). [\(I.B.C.R. 525\)](#)

Statute of Limitations and Delay. There is no statute of limitations in a disciplinary proceeding. Disciplinary proceedings are exempt from statute of limitations. I.B.C.R. 525(o). The unwillingness or neglect of a grievant to file a complaint or settlement between the grievant and lawyer shall not in themselves set abatement of the processing of any grievance. The time between the commission of the alleged misconduct and the filing of the grievance predicated thereon may be pertinent to whether and to what extent a sanction should be imposed, but does not limit Bar Counsel's power to investigate and prosecute. I.B.C.R. 525(h). [\(I.B.C.R. 525\)](#)

Judicial Notice. The Hearing Committee may take judicial notice of facts entitled to such notice provided, however, the facts judicially noted shall be specified by the Hearing Committee at the time of the hearing or at the time of declaring its findings of facts, whichever it deems appropriate. I.B.C.R. 525(m).